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IN THE

Supreme Court of the United States

October Term 1973

No. 1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICTS; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors.

REPLY TO BRIEFS IN OPPOSITION

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1. The Brief in Opposition submitted on behalf of the National Labor Relations Board contains a fundamental misconception of the manner in which the hiring hall in the maritime industry operates, a misconception which goes to the heart of the Board's erroneous disposition of the case. Counsel for the Board states, at Page 8 of the Board's Brief in Opposition, that Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement operates like a union signatory clause in that it assures only that the NMU membership "as a whole" does not suffer as a result of a transfer. This simply is not so!

The unit of employees protected by Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement consists of those employees entitled *by the contract* to seek employment aboard the employer's (in this case Commerce's) vessels through the hiring halls established by the collective bargaining agreement. This unit consists of both union and *non-union* members and, in point of fact, referral for employment through the hiring hall is not and could not be limited to union members, *Local 872 International Longshoreman's Association*, 163 NLRB 586 (1967); *Local 1351, Steamship Clerks, etc.* v. *NLRB*, 329 F.2d 259 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 993. In addition, there are many members of the NMU who are *not* part of the bargaining unit protected by Article 1, Section 2. For example, the NMU has numerous collective bargaining agreements with companies operating on the inland rivers and lakes. These collective bargaining agreements contain separate hiring hall provisions, and the employees working under these agreements receive *no* protection from Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement. The NMU also represents government seamen as well as many employees in non-maritime fields who were not in the Commerce bargaining unit and received no protection from Article 1, Section 2. In short, it is a basic and fundamental error to equate NMU membership with those employees entitled to seek employment through the hiring halls established by the NMU Tanker collective bargaining agreebent, first, because the membership of the NMU is much larger than the unit of employees covered by the tanker collective bargaining agreement, and, second, because the unit covered by the collective bargaining agreement includes individuals who are *not* members of the union. Thus, Article 1, Section 2 does not operate as a union signatory clause and does not operate to protect the jobs of the NMU membership "as a whole."

2. Counsel for the NLRB and the Intervenors try to attribute anti-SIU *animus* as being the basic purpose for the adoption of Article 1, Section 2 of the NMU Tanker collective bargaining agreement. The evidence is directly to the contrary. No finding of any anti-SIU *animus* was made by the Board, nor did such alleged *animus* play any part in the Board's decision. The testimony cited in the Briefs in Opposition as supporting this claim of anti-SIU *animus* occurred at the hearing before Judge Croake on the Regional Director's application for a Section 10(l) injunction. Judge Croake rejected any claim of anti-SIU *animus* as follows, *McLeod* v. *National Maritime Union of America*, 329 F. Supp. 151, at 157-158 (SDNY 1971):

> "Turning to the particular facts, the Court concludes that on this record the motivation of the NMU in negotiating and enforcing the collective bargaining agreement with Commerce, and with the other tanker operators as well, *was to preserve as many of the declining number of jobs as possible for NMU seamen.* Its paramount desire was the traditional and valid one of protection of the 'job pool' and the Pension Plan and other elements of job security of its members in the face of increasing automation. *It does not appear to have had the objective of supplanting SIU in whole or in part as bargaining agent with Vantage.* Nor was there any other dispute between NMU and Vantage upon which motivation for secondary activities could be predicated." (Emphasis supplied)

The testimony relied upon in the Briefs in Opposition that NMU would rather see the jobs go foreign than to SIU is quoted completely out of context. It arose in the following manner. Mr. D. David Cohen, Corporate Counsel for Vernitron Corporation, Commerce's parent company, testified that he had a meeting with Mr. Shannon Wall, then Secretary-Treasurer of the National Maritime

Union, at which Mr. Wall allegedly stated that he would rather see the ship go foreign than be lost to SIU. This was not a complete statement of what was said to Mr. Cohen at that meeting. Rather, the point being made by Mr. Wall was that the basic trade of United States flag tankers is the American coastwise trade which is restricted to United States flag vessels. Since foreign vessels cannot compete for this trade, should an American coastwise tanker be sold foreign it will no longer be competing for the American coastwise trade. In such circumstances the cargo formerly handled by the vessel will be picked up by another American vessel, possibly one with an NMU crew. Thus, where a tanker is sold foreign it may *not* result in any loss of jobs to NMU seamen. However, where a vessel is sold to an SIU company engaged in American coastwise trade, then the loss of the jobs to the NMU bargaining unit is a certainty. It was in this context that the statement attributed to Mr. Wall was made, a fact that Mr. Cohen was forced to concede on cross-examination as follows (a 77-a 78):

> " * * * When it came to the question of the point that you were posing to the union, that you would reduce the jobs anyway if the Barbara did not operate, do you recall that was pointed out to you if the jobs are lost on the Barbara that there is a good possibility that some other NMU company could pick them up? A. Yes, definitely did say that.
>
> Q. Are you now aware since becoming involved in this particular litigation that the Barbara as an American Flag tanker was eligible to operate in the American coastwise trade? A. Yes.
>
> Q. Whereas a foreign tanker could not. A. Yes.
>
> Q. So that the sale to foreign could still possibly leave the sailing to NMU seamen? A. Yes, I think we even discussed at that meeting just as an example that if the vessel was sold foreign that the

American business that would be left could be competed for by both NMU and SIU seamen.

Q. By the remaining American companies? A. By the remaining American companies."

The foregoing also explains why the NMU was less concerned about applying Article 1, Section 2 to a foreign sale than it was about applying it to a domestic sale. There were a number of reasons why Article 1, Section 2 was not made applicable to foreign transfers. First, the provisions of Article 1, Section 2 could not feasibly be applied to a foreign flag vessel because a foreign flag ship might not stop in United States ports where it could be serviced by the Union. Second, foreign law frequently prohibits unions of countries other than that of the flag of the ship from representing employees on that ship. Third, this Court has held, and recently has reaffirmed, the principle that the National Labor Act does not apply to foreign flag ships. *McCulloch* v. *Sociedad Nacional, Etc.*, 372 U.S. 10 (1963), *Windward Shipping (London), Ltd.* v. *American Radio Ass'n.*, U.S. , 94 S.Ct. 959 (1974). Thus, for all these reasons, it was impracticable to seek to apply Article 1, Section 2 to a foreign transfer, and the failure to so apply it was not due to any lack of desire by NMU not to seek protection of the jobs of unit employees where a ship was sold foreign, nor does it support the claim that the adoption of Article 1, Section 2 was motivated by an anti-SIU *animus*.

3. Counsel for the Intervenors argue that this Court should hold that Article 1, Section 2 is invalid because it is in conflict with the fleetwide principle applicable to defining bargaining units in the maritime industry. The short answer to this argument is that it was not the basis on which the Board decided the case. In fact, the Board specifically found the arguments relating to the application of the fleetwide principle were "not germane" to its decision (21 a). The reason why this argument with respect to the fleetwide

principle is "not germane" was initially pointed out by Judge Frankel as follows:

> "Finally, to give the subject more than it deserves, the intervenor seems mistaken in its apparent premise that rules defining appropriate bargaining units may or should be read to outlaw work preservation agreements."

Trial examiner, Thomas A. Ricci, disposed of this claim as follows:

> "But this mistaken reliance upon *Moore-McCormack* falls short of condemning Article 1, Section 2 of the NMU contract for an additional reason. If the purchaser had been a newly formed company, or one that had never operated seagoing tankers, would the restrictive clause be deemed proper? *It is difficult to see how the fortuitous circumstances of a particular purchaser could serve to make an otherwise lawful contract illegal.*" (37a.) (Emphasis supplied)

4. Finally, counsel for Intervenor SIU argues that this Court should deny certiorari because the decision below is "uniquely narrow." Notwithstanding counsel's constant repetition of this phrase, there is nothing "uniquely narrow" about the Board's decision. The Board did not decide the case on basis applicable only to the maritime industry; rather, the impact of the decisions below will have effect on all industries where the hiring is through hiring halls. The effect of the decisions below is to make it impossible for any union which represents a unit of employees who are hired through a hiring hall to seek job preservation for those unit employees. Thus, it is not in any sense a "narrow" decision; rather, it will affect many workers and a wide variety of industries, and, since it represents a substantial departure from this Court's prior decision in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), it raises issues of the utmost importance which require review by this Court.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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